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SHARĪʿAH AND CIVIL LAW: TOWARDS A METHODOLOGY OF HARMONIZATION

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Abstract

In this essay I propose a new methodology for the harmonization of Sharīʿah, based mainly on my experience teaching and researching Islamic jurisprudence over the past two decades. This is a new area of research that requires further elaboration and development. Inasmuch as I seek to provide criteria and guidelines for further development, the proposed methodology, of necessity, is open to scrutiny and refinement. The essay is presented in two parts. In Part I, I examine the meaning of harmonization both as a concept and as a method that seeks to bring greater coordination and consonance between the Sharīʿah and civil law. In Part II, I articulate a set of methodological guidelines to stimulate future contributions to the subject. The two sections are inter-related and both are concerned with articulating a methodology for the proposed area of research.

Harmonization of Sharīʿah is primarily concerned with the law as it exists, less so with proposing new legislation. Its methodological tools, to be articulated below, are concerned with selection (*takhayyur*) of the relevant parts of the Sharīʿah and civil law and piecing them together (*talfīq*) with a view to harmonizing them into coherent and unified formulas. Both *takhayyur* and *talfīq* are familiar tools of *uṣūl al-fiqh* which can be subsumed under the wider concept of *siyāsah sharīʿyyah* or Shariʿah-oriented policy. By using these and other tools and concepts, I seek to advance a perspective on developing fresh

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avenues of coordination and uniformity between Shariʿah and civil law. I also discuss *ijtihād*, *fatwā* and statutory legislation and the manner in which they can be used in our quest for harmonization of the two fields. The most important theme of this essay, however, is the broader effort to identify real or potential areas in which the goals and purposes of Sharīʿah (*maqāṣid al-Sharīʿah*) can be harmonized with those of civil law. My objective is to expound the manner in which the *maqāṣid al-Sharīʿah* can be used as instruments of harmonization. Although the current project looks ahead to the future, the methodology proposed here takes account of the past as it seeks to rearrange and coordinate the existing body of Sharīʿah and civil laws within a given perspective and framework. I begin by defining what I mean by harmonization.

I. Harmonization: Defining the Framework

1. In this essay, the term *harmonization* is used both as a substantive concept and as a method and procedure. The word presumes compatibility and concordance between two substantially different rulings of the Shariʿah and civil law, as there is no need to harmonize similar or identical positions. The dictionary defines the adjective "harmonious" as "justly proportioned," implying balanced attention to bringing coordination and consonance between two or more divergent and disproportionate positions. The typical dictionary example of "harmony" refers to musical concordance that is brought about "in accordance with the physical relations of sounds or bodies emitting such sounds". *Collins Dictionary* gives as example of harmonization, "the progressive introduction of norms and standards applicable in the EEC [European Economic Community] countries."

Three points are clear. First, harmonization presumes from the outset the existence of a degree of compatibility between two or more components. Thus, it cannot be applied to laws and concepts that are essentially incompatible. Second, harmonization applies both to physical objects, such as placing certain objects in a state of harmony with one another, and to abstract ideas, sounds and relationships, without, however, attempting to introduce new changes on either side. It is this latter sense of harmonization that is of greatest interest to us. Third, harmonization is an attempt to change the relationship between two or more objects, rules or ideas so as to bring them

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into a state of compatibility; it may also result in the introduction of new rules, norms and standards, as in the case of EEC, which seek to develop coordination and agreement.

2. The concept of Islamicization has been the subject of scholarly attention since the early 1970s. Harmonization differs from Islamicization, and it is therefore a new concept, at least in the context proposed here. "Islamicization of knowledge" has been viewed, especially by its non-Muslim critics, with circumspection, even suspicion, both with regard to the concept itself and its subject matter. For many commentators, Islamicization is a unilateral proposition and is therefore unacceptable. Islamicization of knowledge is basically a response to the pre-eminence of science and scientific reason, which precludes religious and metaphysical knowledge from its scope. Islamicization of knowledge seeks to rectify this by its inclusive approach to the metaphysical dimension of knowledge. With reference to subject matter, "Islamicization of knowledge" is too broad, lacking specificity and focus. Some Muslim scholars also have begun to use the alternative expression, "the Islamicization of the social sciences." Even with this adjustment, however, the concept is not devoid of weakness and critics have continued to question its basic premises, feasibility, and focus.[1]

The concept of harmonization should not evoke the same criticism that has been leveled at the "Islamicization of knowledge." The basic strength of the concept lies in its openness to reciprocity and compromise. Compared to Islamicization, harmonization of Sharīʿah and civil law is theme-specific and better defined in its purpose. Harmonization conveys the awareness that knowledge, whether knowledge in general, or knowledge of Sharīʿah and civil law, is a cumulative and shared achievement of mankind. Harmonization thus seems to hold a better prospect of general acceptance as it is inherently inclusive and open to cross-fertilization of ideas.

If the Islamicization of knowledge seeks to integrate the metaphysical dimension of knowledge and the overriding authority of

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[1] Fathi Malkawi has reviewed the critique of *Islamiyyat al-Maʿrifah* (Islamicization of knowledge) mainly from the perspective of Muslim Arab writers. About twenty authors and commentators have been discussed. See his "Ḥiwārāt Islamiyyat al-Maʿrifah Mulāḥaẓāt Naqdiyyah, *Islamiyyat al-Maʿrifah* 25 (1422/2001), 99-136.

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divine revelation, then this goal is already a component part of our conception of harmonization–minus perhaps the word *islamicization*, which in my view, is not particularly well-chosen. Harmonization differs, however, from Islamicization because of its openness to reciprocity and exchange in the quest to establish harmony between two different legal rulings or legal traditions.

3. We use 'civil law' in the sense of positive law, i.e., the applied body of rules, ratified by the people's representative assemblies, away from the exclusive domination of charismatic monarchs who for much of history virtually dictated the law. Civil law is grounded in rationality and it is objectively enforced by the rational judgments of competent tribunals. Judges are the executors of this law and have themselves no claim to represent the charismatic authority of powerful individuals. Civil law is mainly a product of developments in 18th and 19th century Europe.

Civil law, which is based on Roman law, encompasses private rights and claims between individuals as opposed to criminal law and offences against the state. After the fall of the Roman Empire, the customs of the ruling tribes developed into customary law throughout most of continental Europe. Roman law was rediscovered in the 12th century and European jurists began to codify the existing legal systems, with additions from Roman law. The *Corpus Juris Civil* of Justinian I (6th century) played a special role in the evolution of these legal systems. The development of civil law was further enhanced by the Code Napoleon (1804), which gave France a unified national code. Other countries followed the French lead, both elsewhere on the continent and in Latin America.[2] The French civil law tradition maintains that the elected legislature is the decisive arm of public opinion and should be the sole law-making authority in the land. Judicial decisions flow from this law, emanating from judges guided by the legal text, rationality and logic, not by the influence and authority of powerful rulers.

Muslim thinkers have found considerable common ground with the basic notions of civil law. Although the Sharīʿah is admittedly grounded in the authority of both revelation and reason (*wahy* and *ʿaql*), the notions of objectivity, rule of law, and impartial enforcement of the law by a competent court are also ingrained in the Sharīʿah.

[2] Cf. *The New Webster's International Encyclopedia* (under civil law), 229.

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One may, in this connection, draw a distinction between the Shariʿah and *fiqh*: whereas the former is grounded mainly in divine revelation, the latter is largely a product of human reason, juristic interpretation and *ijtihād*. *Fiqh* is therefore capable of adaptation and, for this reason, more open to the demands of harmonization.[3] *Ijtihād* is also a rational concept that applies mainly to civil transactions (*muʿāmalāt*) to the exclusion of devotional matters (*ʿibadāt*), and must therefore be based on proper grounds. The judge is required to expound the evidential bases of his decisions in the issuance of judgments and the formulation of *ijtihād*. The Qur'ānic concepts of *ūlū'l-amr* (those in charge of community affairs), consultation (*shūrā*) and the related notion of *ahl al-shūrā* (those who are capable of giving counsel), and the *fiqh* concepts of *siyāsah sharʿiyyah* (Sharīʿah-compliant policy), *faqīh* and *mujtahid* also suggest that the laws of Sharīʿah are applied by reasonable and knowledgeable persons who have the capacity to represent the community and the *ummah*--even if Muslim rulers historically have paid little attention to *shūrā* and participatory governance.[4]

4. Harmonization involves a measure of Islamicization in the sense that what is being harmonized with the Sharīʿah is also being made acceptable to Islam. Yet we have chosen to use the word "harmonization" in the title of this essay on the grounds of accuracy and caution: since we are concerned with the Sharīʿah and civil law, the term "Islamicization" in reference to the Sharīʿah would be redundant. Thus, had we called our essay "Islamicization of Sharīʿah and Civil Law," this obviously would be inaccurate. The same may also apply, in part, to the other side of the equation, that is, civil law. To say that one attempts to Islamicize the civil law of a Muslim country such as Malaysia, Jordan or Pakistan, assumes that the civil law of that particular country is un-Islamic. In fact, however, a great deal of the civil and statutory laws of, for

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[3] On the distinction between Shariʿah and *fiqh* see further M.H. Kamali, "The Shari'ah: Law as the Way of God," in *Voices of Islam*, ed. Vincent Cornell (Westport, CT., Praeger Publishers, 2007), 1:194ff.

[4] On *siyāsah sharʿiyyah*, see M.H. Kamali "*Siyāsah Sharʿiyyah* or the Policies of Islamic Government," *The American Journal of Islamic Social Sciences* vi (1989), 59-81. A section on *shūra* is also found in idem, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997), 40-5. *Ūlū'l amr* is also explained in idem, *Principles of Islamic Jurisprudence*, Third rev. ed. (Cambridge: Islamic Texts Society, 2003), 236f.

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example, Malaysia, are in harmony with the Sharīʿah and therefore do not require Islamicization. Moreover, as a discipline and branch of the behavioral sciences, law may require treatment different from that of other social and behavioral sciences. Defined in a positivist sense, as the command of the sovereign, law is normally issued by governments and is subject to close linguistic scrutiny, especially when dealing with sensitive issues. Legislative assemblies in Muslim countries are usually careful not to pass laws that may seem, or be seen as, un-Islamic. Instances of conflict between Sharīʿah and civil law are thus infrequent.

5. As noted, harmonization is open to the mutual impact of both the Sharīʿah and civil law on one another. Certain aspects of civil law can be made Sharīʿah-compliant through amendment, either substantive or procedural, of an existing statute in accordance with normal legislative procedures. It has been suggested, for example, that, under the Pakistan Army Act 1952, the denial of appeal to defendants sentenced by court martial is contrary to Islamic law because the Shariʿah does in fact validate appellate review of sentences, especially with regard to crimes and penalties that require a high level of scrutiny. To harmonize this statutory ruling with the Sharīʿah would require amending that Act through parliamentary procedures so as to open court martial procedures to appellate review.[5]

Certain aspects of the Sharīʿah in the sphere of civil transactions (*muʿāmalāt*) may be amended and harmonized with the constitution and other laws through a variety of methods, including *ijtihād* and statutory legislation (see below). Any gap between a ruling of *fiqh* and prevailing social reality may call for fresh *ijtihād*, both for its own sake and in the interest of developing greater harmony between Sharīʿah and civil law. This is in line with the well-known Islamic legal maxim that *fatwā* rulings and *ijtihād* may change in accordance with changing times and circumstances: "it is undeniable that legal rules change with the change of times–*la yunkaru taghyīr al-aḥkām bi-taghyīr al-azmān*".[6] Many of the mid-20th century family law reforms

[5] Cf. Nasim Hasan Shah, *Islamicization of Law in Pakistan* (Islamabad: Shariʿah Academy, 1992), 17. On appellate review, see M.H. Kamali, "Appellate Review and Judicial Independence in Islamic Law," in *Islam and Public Law*, ed. Chibli Mallat (London: Graham & Trotman, 1993), 49-85.

[6] Cf., Muṣṭafā Aḥmad al-Zarqā, *Sharḥ al-Qawāʿid al-Fiqhiyyah*, 2nd ed. (Damascus: Dār al-Qalam, 1409/1989), 227.

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in the Middle East and elsewhere, introduced by statutory legislation, were instances of harmonization of Sharīʿah and civil law. Some of these reform measures entailed the amendment of e.g. the laws of polygamy and divorce with a view to bringing them into harmony with the broader objectives of justice in Islam, the principle of equality under the constitution, as well as concern for the well-being of the family. Since the Shariʿah and civil law both advocate these objectives, the harmonization of these two bodies of law is clearly a feasible proposition.

The closing decades of 20th century witnessed a revival and adjustment of certain aspects of Islamic commercial law in relationship to Islamic banking and finance. Here we have seen a mixed development of harmonization of Sharīʿah and civil law, whereby many statutory law provisions were brought into harmony with the Sharīʿah. Certain aspects of the Sharīʿah laws of partnership (e.g. *sharikah*, *muḍārabah*) and finance (e.g. *murābaḥah, ijārah*) have been subjected to new procedures for the purpose of better management of transactions in Islamic banks and financial institutions. This process of harmonization through adjustment and reform in both Sharīʿah and civil law is still operating through e.g. the introduction of new products and procedures in Islamic banks that seek to promote harmony in the financial system, especially with reference to the laws and procedures of Islamic banks and conventional banks.

One is tempted to say that there is more harmony than discord between the two sectors of banking, due to the unmistakable similarity between many of the transactions and products that are practiced in both sectors. The central bank in most Muslim countries continues to supervise both conventional and Islamic banking operations, and there is a persistent concern to develop common standards and procedures in all banks, despite the recognition of basic differences between Islamic and conventional sectors. The desire to develop common standards also favors the prospects of harmony between the applied laws and procedures of the two banking systems.

6. In the areas of dogma and rituals (*ʿaqīdah* and *ʿibādāt*) certain aspects of the Sharīʿah are outside the scope of harmonization, because they stand outside the scope of statutory legislation and *ijtihād*. Harmonization of Sharīʿah and civil law is concerned, in the initial stages, with civil transactions (*muʿāmalāt*), commercial law and finance, areas in which fresh interpretation, legislation and *ijtihād*

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are feasible and hold prospects of beneficial adjustments that can stimulate socio-economic development.

Notwithstanding the fact that changes have occurred in other areas of the law, such as family law, constitutional law, Islamic education (including the introduction of Islamic universities), commercial law and finance have attracted by far the greatest attention in recent decades.

When many Muslim countries of the Middle East and Asia introduced Islamic Family law reform in the 1950s and 60s, no one, it seems, spoke of either Islamicization or harmonization, although some of the laws that were introduced fit the description of both. However, it appears that most of the reforms in the areas of marriage, divorce and inheritance were in the direction of harmonization of Sharīʿah with civil law principles rather than Islamicization as such. Thus it appears that harmonization of Sharīʿah and civil law is not new to our experience, even though the word was not commonly used. Many commentators regarded those reforms as instances of neo-*ijtihād,* because they were based on novel interpretations of the relevant texts of the Qurʾān. The mid-20th century law reforms revisited the Islamic sources, especially the Qurʾān, and introduced fresh interpretations through the modality of statutory legislation.

7. In our discussion of the methodology of harmonization, we propose to utilize as tools certain aspects of the methodology of *uṣūl al-fiqh*, albeit with adjustments (see below). Many verses of the Qurʾān may need to be re-interpreted in the light of developments in the market place and in science and technology, and of new patterns of relations among nations, civil society groups and multinational institutions. We propose to include statutory legislation that is in harmony with the goals and objectives of Sharīʿah (*maqāsid al-Sharīʿah*) in our methodology for harmonization, even though the legal theory of the sources of Sharīʿah, the *uṣūl al-fiqh*, and its methodology, do not, in fact, envisage statutory legislation.

8. Harmonization can be perceived either as a dogmatic and totalitarian activity that demands total harmony between its various components, or as an activity that admits of partial steps toward reaching an adequate level of concordance and coordination between aspects of Sharīʿah and civil law.

Since harmonization is grounded in reconciliation and compromise, it should be open to piecemeal approaches that will establish partial assonance between Sharīʿah and civil law notwithstanding the exis-

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tence, in particular cases, of basic differences between them. It will be noted, however, that a satisfactory answer to the question can best be determined on a case-by-case basis. There may be instances in which two positions are not in total conflict, in which case the door to harmonization, whether basic or otherwise, remains open. Instances of such harmonization can be found in the family law legislation introduced by many Muslim countries in the second half of the 20th century. The Sharīʿah laws of polygamy and divorce were changed in some respects but retained in others. A level of harmony has thus been achieved, notwithstanding certain differences in the legal status of husband and wife that exist in the Sharīʿah law of personal status.

9. Harmonization cannot be entertained between two diametrically opposing positions, e.g. the two different positions of Sharīʿah and civil law on banking interest *(ribā)*, one prohibitive, the other permissive. One cannot have an Islamic bank that practices *ribā*, or a conventional bank that does not practice interest. To attempt harmonization on this basic position would be unrealistic, which is why there is duality and separation, rather than uniformity and merger, between Islamic banking and conventional banking. Yet we are not taking a dogmatic approach on this subject and we do not say that the two institutions are in conflict in every respect. For, as noted earlier, there are instances of harmony between them in other respects. Note, for example, that *al-wadīʿah* (deposit accounts) or *sharikah* (partnership) and certain other Sharīʿah-based products that are now available in conventional banks, many of which have opened Islamic banking windows.

Another example of conflict in the area of *muʿāmalāt*, not necessarily related to Islamic banking, is the notion of *caveat emptor* in common law and the option of defect (*khiyār al-ʿayb*) in Sharīʿah law. The former entitles the seller not to declare existing defects in the object of sale to the buyer, whereas the latter denies him that right. Islamic law requires the seller to disclose defects in his goods, even if he is not specifically questioned about them. The two positions are in conflict, although one might imagine some level of compromise between them if one were to look into their basic rationale and objective. Briefly, *khiyār al-ʿayb* is grounded in considerations of equity and fair dealing and introduces a moral element into the fabric of the law that may not be totally devoid of all subjectivity and doubt.

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English common law, on the other hand, attaches greater value to freedom of contract and considerations of clarity, certainty and consistency in the law. English courts have thus sided with positivism, which, in turn, is grounded in the separation of law and morality. It may now be possible, as demonstrated by some court decisions in the United States, Germany and elsewhere, to observe the basic rationale of positivism, certainty and consistency even in decisions that uphold considerations of equity.[7] The two sets of objectives that are upheld in the Sharīʿah and common law, respectively, are not necessarily in conflict.

We note further that the determination of harmony and conflict may sometimes be focused on specific rules and principles, just as, at other times, it may contemplate the basic objective and rationale of those rules. The latter approach is in line with the *maqāṣid*-oriented approach of the Sharīʿah, as explained below, and both Sharīʿah and common law would seem, in this case, to offer wide prospects for harmonization and compromise.

One of the juristic positions maintained by *fiqh* scholars is that the clear injunctions of Sharīʿah, particularly in the sphere of prohibitions, are not open to the more philosophically-oriented approaches of *maqāṣid al-Sharīʿah*. This would mean, for example, that one cannot open the prohibition of *ribā* to the *maqāṣid* debate with a view to harmonizing this position with that of its opposite, with the result that *ribā* would be declared permissible. However, one may advance the argument that interest is conducive to more effective monetary control and advances people's welfare.

Yet in the absence of a clear textual prohibition, rules that may appear to be in conflict with one another but which share similar goals and objectives can be harmonized at the level of *maqāṣid*. Suppose, for example, that two legal rulings propose two different prison terms for the same offence, say two and three years, respectively, and therefore may be said to be in conflict. Yet when judged by their objectives--both seek to penalize the offence in question even if they propose different punishments for it--they may also be seen to be in basic harmony it. Similarly, with reference to the scale of five

[7] Cf. Syed Misbahul Hasan, "Good Faith and Fair Dealing in Commercial Transactions: Some Comparative Perspectives," conference paper presented at International Conference on Law and Commerce, IIUM, Kuala Lumpur, June 2002, 4ff.

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values in Sharīʿah, an act may be classified as reprehensible (*makrūh*) by one *madhhab* and prohibited (*ḥarām*) by another: This is clearly a case of conflict. But since both *madhhab*s share a negative and disproving attitude toward the act in question, the conflict between them may be seen as one of potential harmony.

10. In their discussion of conflict and preference (*al-taʿāruḍ wa'l-tarjīḥ*), the *ʿulamā'* of *uṣūl al-fiqh* have not paid much attention to the *maqāṣid al-Sharīʿah* and have tended to take a textualist approach to the understanding and interpretation of the Qur'ān and Ḥadīth. They have paid more attention to the linguistic particularities of words and sentences than to their goals and purposes. Although we propose to follow the basic premises of their discourse, as a firm grasp of the language of the text is undoubtedly important, our approach to the evaluation of harmony and conflict differs somewhat from the linguistic approach of the scholars of *uṣūl*.

One reason why Muslim jurists have paid greater attention to the language of the text is because they operate within the legal framework of Sharīʿah, which, admittedly, is dominated by the divinely revealed text. But when one compares provisions of the civil law with those of Sharīʿah and tries to harmonize them, one is no longer operating within this unitary framework. In this case, one is less concerned with comparing one text with another, and more concerned with basic provisions, ideas and approaches. As a result, one may be inclined to take a broader view of the legal landscape, and in doing so, one may need to pay greater attention to goals and objectives as well as to the language and nuances of the text.

11. In their identification of conflict between two *fiqh* rulings, Muslim jurists have tended to be expansive, highlighting almost all instances of conflict, including cases of minor discordance, exception (*istithnā'*) and particularization (*takhṣīṣ*). In their attempt at reconciliation (*jamʿ*) and preference (*tarjīḥ*), however, they avoided conflict (*taʿāruḍ*) and abrogation (*naskh*) on the assumption that the divine Sharīʿah could not entertain conflicting propositions. On the whole, it was considered preferable to retain both of the two divergent *fiqh* rulings, or at least one, if not both, and in this way to avoid or minimize the prospects of suspension and abrogation of Sharīʿah injunctions.

Since our task in identifying instances of harmony or discord between Sharīʿah and civil laws consists mainly of ascertaining basic positions, ideas and principles, we are not concerned with

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the technicalities of *uṣūl al-fiqh* in the areas of conflict and preference (*taʿāruḍ wa tarjīḥ*), nor with its meticulous details on the general and the particular, the absolute and the qualified (*ʿāmm, khāṣṣ, muṭlaq, muqayyad*). As we are not operating exclusively within the Sharīʿah framework, we are mainly concerned with the comparison of rules and principles of modern law with those of Sharīʿah, rather than with the textual analysis of Sharīʿah laws.

12. Harmonization of Sharīʿah and civil law may sometimes pose a question of language and style of presentation, without involving substantive legislation or *ijtihād*. This may mean presenting a certain aspect of the Sharīʿah in a new way that highlights its commonality and concordance with civil law. It also may mean taking an approach to the exposition of Sharīʿah that seeks to bridge a gap between Sharīʿah provisions and the demands of real life situations, as illustrated below.

With reference to *fiqh* terminology on weights and measures, for example, the Arabic terms (e.g., *ṣāʿ, wasq, qullah, diyah, dirham,* and *dīnār*) found in the *fiqh* manuals may be converted into their modern equivalents. Technical expressions found in conjunction with *zakāh* (legal alms), especially with regard to the technical Arabic terms used for *zakāh* on different types of livestock, as well as Arabic words used for different age categories of camels, may need to be converted into their modern equivalents–indeed, sometimes into monetary equivalents, if the rules of *zakāh* are to be harmonized with contemporary economic conditions. Simple conversions can help make the *fiqh* provisions easily comprehensible and, at the same time, highlight, as far as possible, aspects of harmony or equivalence between Sharīʿah and modern laws.

The language of the law and the way it is expounded and articulated can also help bridge a gap between *fiqh* and modern law. Writers/researchers should make an effort to avoid using obsolete aspects and formulations of *fiqh* and to focus instead on those aspects that are more relevant to people's needs. When discussing the *fiqh* rules on partnership, for example, one should try to relate them to contemporary commercial practices, instead of indulging in lengthy analyses of forms of partnership that are obsolete or no longer in vogue. By being selective and relevant and speaking the language of the day, one may help to highlight the common features of Sharīʿah and contemporary law.

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13. According to one commentator, Islamicization is a "response to Western political and economic domination and seeks to gloss over the weaknesses of contemporary Muslims vis-à-vis the onslaughts of modernity...."[8] Harmonization is not grounded in such an attitude. The two major components of harmonization that are under discussion here are Sharīʿah and civil law, the latter consisting mainly of the applied laws and statutes of Muslim countries that have been duly ratified by their legislative assemblies. The process envisioned here is not to civilianize the one or to Islamicize the other, but to harmonize the two, whenever such an effort offers an opportunity to unify and integrate the laws of a particular Muslim country. The basic goal of harmonization is to integrate the discordant laws within a given legal system and to overcome the entrenched problem of duality between Sharīʿah and civil law that persists in the existing laws of these countries.

Different areas of the law pose different challenges. In most Muslim countries, family law is, broadly speaking, Sharīʿah-oriented and has only partially been amended and reformed so as to bring it into harmony with constitutional principles and some of the values of democracy and human rights. In many Muslim countries additional civil law principles have been adopted into a basically Sharīʿah-dominated sphere of personal status. Registration formalities pertaining to marriage and divorce are instances of the positivist demands of civil law that have been adopted by the vast majority of present-day Muslim countries. On the other hand, in most Muslim countries, other areas of the law, such as commercial law and criminal law, have undergone changes that embody the wholesale introduction of European commercial and criminal procedure codes, which still dominate. Only in recent decades has the Islamic law of commerce (*muʿāmalāt*) begun to make inroads in a field dominated by civil law of Western origin. The wholesale adoption of European commercial codes was, to a large extent, a legacy of colonialism, and the law in these areas may require revision so as to bring it into harmony with the Sharīʿah.

In the commercial sphere, attempts to harmonize Sharīʿah and civil law may initially entail identification of areas of harmony and conflict between them. Wherever harmony obtains, no further action

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[8] Bassam al-Tibi, quoted in Fathi Malkawi "Ḥiwārāt Islamiyyat al Maʿrifah," n.1, 107-8.

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will be needed. But instances of conflict also need to be identified and assessed. If the conflict is total and leaves no room for any harmonization, two possibilities can be envisioned: one is to leave matters as they are and accept the duality, as in the case of Islamic banking and conventional banking, both of which co-exist; the other is to push for fundamental changes, as in Sudan, Iran and Pakistan, where a uniform system of Islamic banking has been introduced. An attempt to harmonize instances of conflict may be feasible in situations of partial conflict and in cases where the existing rules, even if different in their specific formulations, are reconcilable in their broader goals and objectives.

II. Methodology of Harmonization

14. Two points need to be made at the outset. First, methodology often consists of a measure of generalization in the interest of developing uniformity and standardization. In the social sciences and humanities, methodology is not expected to lay down fixed laws and formulas. Social science methodology often consists of inductive generalizations that do not apply to all possible instances that fall within their ambit. A legal method is not, in other words, a scientific formula that can be applied universally, but rather a broad guideline that may or may not be inclusive of all of its possible applications.

Second, no methodology operates in a vacuum, nor is it expected to be devoid of objective and purpose. A methodology that is concerned with revealed law and text will differ from one that contemplates juristic opinion and man-made legislation. As noted, in their formulation of the methodology of legal reasoning (*uṣūl al-fiqh*), Muslim jurists were guided by certain objectives, such as their unquestioning reverence for the revealed text. Thus, they were inclined to preserve, as far as possible, rather than strike out and reject, one or both of a given pair of conflicting texts of Qur'ān and hadith. We follow their lead. We too are concerned with Sharī'ah texts, and our goal is to bring Sharī'ah and civil laws closer together rather than to focus on their differences. In the event that one can identify common grounds and objectives between two seemingly discordant positions, one can either attempt to minimize their differences or take the opposite route of maximizing them. We propose

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to take the former approach, without, however, overlooking or disguising instances of genuine disharmony and conflict. The basic purpose and guideline is to realize the *maṣlaḥah* (benefit) and welfare of the people and bring the Sharīʿah closer to the realities of law and government in Muslim societies.

15. The methodology of harmonization proposed here differs from Islamicization with respect to the information that is acceptable or unacceptable to the two concepts. The Islamicization of knowledge, as depicted in the formulations of its proponents, for example, those of the Virginia-based International Institute of Islamic Thought, marks a total departure from the traditional Sharīʿah methodology of *uṣūl al-fiqh* and *ijtihād*. In an article entitled "Methodological Issues in Islamic Jurisprudences," I criticized ʿAbdul Hamid Abū Sulaymān's writings on Islamicization, noting that the tools of *uṣūl al-fiqh* do not have to be totally discarded.[9]

In my view, proponents of the Islamicization of knowledge have not offered a well-defined methodology and they often concern themselves with general themes that lack focus. Abū Sulaymān has proposed an engagement with two readings, one of the text, the other of social reality: reading the Book of God, and reading the creation of God (*qirā'atayn: qirā'at al-waḥy wa-qirā'at al-kawn*). The suggestion is that Islamicization of knowledge should not be a text-bound reading that tends to narrow the scope of interpretation. Abū Sulaymān has engaged in extensive criticism of Western methods that tend to exclude aspects of reality that are not reducible to scientific enquiry and observation. Metaphysical reality, religious knowledge, and revealed knowledge are thus excluded from the scope of "scientific" knowledge. It is here that the secularist approaches come into conflict with the Islamic worldview. Western methods have been criticized but the literature on Islamicization of knowledge has not offered a well-defined methodology of its own. Moreover, the claim to originality and independence from the rich resources of *uṣūl al-fiqh* made by the advocates of Islamicization is questionable. By contrast, the present attempt to suggest a tentative methodology for harmonization draws on the existing data of *uṣūl al-fiqh*, insofar as

[9] *Arab Law Quarterly* 11 (1996), 4-5. In this article, I discuss two of Abū Sulaymān's publications, "*Islamicization of knowledge with Special Reference to Political Science*", 1985 and *Azmat al-ʿAql al-Muslim* (Crisis of the Muslim Mind) (1991), both of which are dismissive of the methodology of *uṣūl al-fiqh*.

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they are found to be relevant and useful. Thus we shall utilize the *uṣūl* formulas such as selection (*takhayyur*), piecing together (*talfīq*), Sharīʿah-oriented policy (*siyāsah sharʿiyyah*), goals and objectives of Sharīʿah (*maqāṣid al-sharīʿah*), as well as *fatwā*, *istiḥsān*, and *ijtihād*.

However, we shall adopt only those aspects of these methods and procedures that we find useful. As for the precise content of harmonization, in particular cases we propose to rely not only on the resources of *fiqh* and *uṣūl al-fiqh* but also those of statutory legislation. By including statutory legislation in our methodology of harmonization, we introduce a new dimension to both *takhayyur* and *talfīq*. I shall presently turn to a brief discussion of these methods and explain how we propose to use them as our tools for harmonization, and where we may be able to introduce a new dimension or addition to one or the other of the methods under review. We shall also include "graduality" (*tadarruj*) in our proposed methodology. This is in line with pragmatic *fiqh* principle of implementing that which is easy to implement (*taṭbīq mā tayassara*) of both the Sharīʿah and civil law.

16. Selection *(takhayyur* or *takhyīr)*: *Takhayyur* means selection and preference of one among the available rulings or opinions of a single *madhhab*, or of the different *madhhab*s on a broader scale, for the purpose of legislation and enforcement. This is a simple question of choosing a particular ruling or formula without any attempt to change or reform it. Although *takhayyur*, like preference (*al-tarjīḥ)*, does not necessarily contemplate enforcement and can be employed in theoretical debates and selection of views, the Ottoman authorities utilized it in the codification of the *Mejelle* (1876) and other laws. Subsequently, it has been widely employed as a means of flexibility and choice among the rulings of the existing *madhhab*s. Twentieth-century family law reforms often consisted of legislation by Hanafi countries that selected some of the rulings of the Maliki school on divorce, and legislation in the Maliki countries that selected provisions of the Hanafi law on the requirements of a valid marriage contract, as I shall presently elaborate.

Although the *Mejelle* codified the preponderant (*arjaḥ*) rulings of the Hanafi school on contracts and obligations, it did not always follow the preponderant ruling of that school. Instead a selection was sometimes made of a relatively obscure opinion of the Hanafi school if it seemed most suitable to the prevailing conditions of society.

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The Ottoman Law of Family Rights 1917 widened the scope of *takhayyur* by including the rulings of other recognized Sunni law schools. The scope of *takhayyur* was further widened by the selection of the views of individual jurists, outside the existing *madhhab*s, if the view so chosen offered the most appropriate of all the available views for purposes of legislation and enforcement. We will illustrate some of the main trends of *takhayyur* and how it has been used as a means of flexibility and reform in Islamic matrimonial law: whereas the Hanafi law provisions concerning divorce are generally restrictive and do not recognize judicial divorce, its provisions on the marriage contract are more liberal. Hanafi marriage law authorizes an adult to conclude his or her own marriage contract without the intervention of a legal guardian. Maliki divorce law recognizes judicial separation and divorce that may follow a failed attempt at arbitration in marital conflicts. The arbitration procedure in family disputes is better defined in the Maliki school than in the other law schools. The differing positions of the Hanafi and Maliki schools made it possible for modern reformers in the Muslim Middle East and elsewhere to select Hanafi positions on marriage and Maliki positions on divorce.

To illustrate the application of *takhayyur* outside the scope of the existing *madhhab*s, we may refer to the adoption, in the Ottoman Law of Family Rights, of the views of Muʿtazilī scholars, Ibn Shubrumah, Abū Bakr al-Aṣamm and ʿUthmān al-Battī on the subject of guardianship in marriage. Contrary to the mainstream juristic opinion of the existing *madhhab*s, these scholars held that there is no justification for guardianship in marriage of a minor person, on the ground that there is no need for such a union. This argument was used by modern reformers to abolish child marriage through the enactment of a statutory marriage age.[10] In this case, the selection was made by the law makers in response to the need for curbing child marriage, which had come to be regarded as a source of mischief that imposes unnecessary restrictions on children's freedom of contract by binding them to an arranged marriage that they cannot reverse even when they become adults. Legislation in Egypt, Syria, Sudan, Morocco, Tunisia, Iraq, and other countries followed suit

[10] For details see Norman Anderson, *Law Reform in the Muslim World* (London: the Athlone Press, 1976), 49-50; and N.J. Coulson, *Islamic Surveys: A History of Islamic Law* (Edinburgh Univ. Press, 1964), 185f.

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and effectively outlawed child marriage by utilizing the expedient of *takhayyur*.

As noted earlier, statutory legislation that is not in conflict with any of the specific laws of Islam and are in harmony with the overriding goals of *maṣlaḥah* and justice may be included in the range of *takhayyur* and selected on the ground of merit and suitability to the needs of society. This means that the prevailing statutory law of a Muslim country might be accorded the status of a *madhhab*, or at least of the opinion of an individual jurist, for purposes of selection and *takhayyur*. To accord this degree of recognition to statutory law is not unjustified. After all, statutory legislation enacted in accordance with normal procedures undergoes the scrutiny of informed individuals and the approval of a consultative assembly or parliament.

17. *Talfīq*, literally *to patch up* or *piece together*, is an extension of *takhayyur* to the extent that the patching applies to a preferred option. Whereas *takhayyur* signifies the selection of a juristic view or opinion as originally formulated without trying to change it, *talfīq* often combines a part of the doctrine of one school or jurist with part of the doctrine of another school or jurist, and, in this way, arrives at a ruling that is deemed to be most suitable. *Talfīq* has been applied in the modern legislation of many Muslim countries, e.g., the law of inheritance and judicial circulars particularly of 1939 and 1943 of Sudan, the Egyptian Waqf Law 1947, the Syrian Law of Personal Status 1953, and the Tunisian Law of Personal Status 1956.[11]

Talfīq and *takhayyur* may fall within the ambit of *taqlīd* when the search for necessary formulas and solutions to issues is confined to the existing literature of the schools and jurists of the past, without involving a direct recourse to independent reasoning and *ijtihād*. This is also true of harmonization, which is concerned mainly with the existing doctrine, opinion or legislation. However, because harmonization is not confined to these two methods and may comprise *ijtihād* and *fatwā*, it is wider in scope and leaves room for fresh interpretation and *ijtihād*.

As we propose to include statutory law in our range of materials for the application of *takhayyur*, it is also suggested here to admit statutory law in the range of available materials for the purpose of *talfīq*, provided that the statute in question is not in conflict with either the clear text or the goals and principles of Sharīʿah.

[11] For details see Anderson, *Law Reform*, 54-8, n. 7.

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Both *takhayyur* and *talfīq* fall, in turn, within the broad range and ambit of *siyāsah shar'iyyah* or Sharīʿah-oriented policy.

18. Sharīʿah-Oriented Policy (*Siyāsah Shar'iyyah*): As a doctrine of public law, *siyāsah shar'iyyah* authorises the ruling authority to take such administrative steps and measures as it deems to be in the public interest of establishing good government, provided that no substantive principles of Sharīʿah are violated thereby. The word '*shar'iyyah*' is used here in a broad sense that encapusalates not the detailed aspects and rulings of Sharīʿah but rather its goals and purposes. There may be instances in which addressing a situation requires decisions in which the specific rules of Sharīʿah cannot be properly observed. Yet those same decisions capture more effectively the general purpose and spirit of the law. The ruler is thus granted discretion to determine, as time and circumstances require, how the Sharīʿah and its wider goals are best administered. To do this, it may be necessary to postpone certain rules when their implementation gives rise to more stressful situations, or it may be necessary to make exceptions to the general rules of Sharīʿah. For instance, when the second caliph ʿUmar postponed the prescribed punishment of *ḥadd* for theft, or when he suspended the prescribed share of *zakāh* revenues for the *mu'allafat al-qulūb* (befriended people) he reportedly acted on considerations of *siyāsah*. Similarly, when ʿUmar disallowed the distribution of fertile lands in Iraq among the warriors, he also acted on considerations of *siyāsah*.[12] In these cases, the caliph acted in pursuit of the higher objectives of justice and welfare at the expense of a prescribed punishment.

These two modes of *siyāsah*--postponement of a ruling and making an exception to a general rule--are also involved, as Ibn Rushd explained, in what is known as juristic preference (*istiḥsān*). This may involve (1) the setting aside of a rule, which may consist of the existing law and *qiyās* (analogy), in favor of an alternative rule, or (2) making an exception to the normal rules.[13] The purpose of *istiḥsān* is often to prevent hardship and to seek better solutions on grounds of equity and fairness. Although there are technical differences between *siyāsah* and *istiḥsān*, they share the broad objective

[12] Cf. ʿAbd al-Majīd al-Najjār, *Fi Fiqh al-Tadayyun Fahman wa Tanzīlan* (Qatar: Kitāb al-Ummah 1989), 14.

[13] Ibn Rushd, *Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* (Cairo: Matbaʿa al-Istiqamah, 1371) 2:154.

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of finding equitable solutions to issues when the existing law fails to deliver justice. Both *siyāsah* and *istiḥsān* tend to involve a departure from the existing rules of Sharīʿah. Since we include statutory law alongside *fiqh* rulings in our available materials for harmonization, *siyāsah* or *istiḥsān* may require a departure from an existing *fiqh* rule or statutory law, making an exception to them, or simply giving preference to a *fiqh* rule over that of statutory law, or vice verse.

Istiḥsān, which is a mode of *ijtihād*, is regulated by a methodology of its own. *Siyāsah*, on the other hand, is more of a policy decision, and, as such, a tool in the hands of political authorities. Only the ruler and judge make *siyāsah*-based decisions, whereas *istiḥsān* is resorted to by political authorities as well as by the judge or *mujtahid*.[14]

Siyāsah sharʿiyyah has been applied extensively in the spheres of criminal law and criminal procedure as well as in the particularization of court jurisdiction (*takhṣīṣ al-qaḍā*). In the area of substantive criminal law, the Sharīʿah has established only a few specific penalties, known as *ḥudūd*, for serious crimes. As for the rest, the ruler is granted discretion to introduce measures, both procedural and substantive, to prosecute and punish criminal conduct. Twentieth-century reforms in almost all Muslim countries included the introduction of specialized courts and tribunals, side by side with the Sharīʿah courts, to adjudicate e.g. in commercial and labor disputes, which follow procedures different from those of the Sharīʿah courts.

Siyāsah Shariʿiyyah can be utilized as an instrument of harmonization between the Sharīʿah and law in a manner similar to that employed in the past. To pursue the higher goals and objectives of the Sharīʿah and civil law at the expense of a departure from existing *fiqh* rules or statutory law on grounds of equity and fairness remains as valid today as it was in the past. In times of emergency, natural calamities and war, there may be cases and situations in which decisions based on *siyāsah sharʿiyyah* must be taken to address the situation, at the expense of a departure from a particular ruling of the existing law and Sharīʿah.

The ruler may deem it necessary to achieve greater integration between the Sharīʿah and civil law to formulate policy decisions and guidelines about how the two may be more effectively harmonized. This may be done, in some instances, through court decisions or

[14] On *istiḥsān* see further M.H. Kamali, *Equity and Fairness in Islam* (Cambridge: Islamic Texts Society, 2005).

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by issuing instructions and policy guidelines that may lead to new legislation. An initiative has been taken, for example, in Malaysia, and work is still underway to integrate Sharīʿah and civil laws of evidence for uniform application in both Sharīʿah and civil courts. By its nature, this project involves harmonization of the laws of evidence opf the two fields into a unified body of law and procedure of equal application in all courts. This is because the notion of proof is indivisible, regardless of the type of tribunal that adjudicates a particular dispute.

Similar projects might advance the objective of harmonization in specific areas of Sharīʿah and civil law. For instance, the Sharīʿah doctrine of options (*khiyārāt*), particularly the option of defect (*khiyār al-ʿayb*) and the option of stipulation (*khiyār al-sharṭ*), are more consumer protective and should perhaps be integrated into the body of law that regulates the sale and purchase of goods, with a view to enabling the customer to return faulty objects upon discovery of a material defect, even after completing the purchase thereof. Similarly, the Sharīʿah law of pre-emption (*shufʿa)* which gives the owner of real estate a priority right to purchase when adjacent property has been offered for sale may be also adopted into the civil law. The law of *shufʿa* may be deemed to promote a better pattern of neighborhood relations, and a more effective way of reclamation of barren lands in the countryside. If these objectives are conducive to public welfare, they may be adopted in the land code and harmonized within the fabric of the applied law of the country concerned. If the law imposes limits on land ownership (e.g., 100 acres per person), then the right of *shufʿa* and the legal limits on land ownership may be subjected to that statutory limit. This would be an instance of harmonization between the law of *shufʿa* and legal limits on ownership.

19. Interpretation and *Ijtihād*: The debate over *ijtihād* in modern times has given rise to two different positions. One position sees the Sharīʿah as a criterion of authenticity that needs to be observed if one is to preserve the purity of *ijtihād*. The focus of this position is adherence to the guidelines of *uṣūl al-fiqh*, and rules governing inferences from and interpretations of text (*al-istinbāṭ min al-nuṣūṣ*). This is a text-bound method that does not pay much attention to attendant realities in society, and its experiences are expected to conform to the textual mandate.

The second position, which is more pragmatic, holds that contemporary *ijtihād* should take its cue from social science research

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methodology, albeit with adjustments that may be necessary to retain the basic Islamic characteristics of the methods in question. The hallmark of this position is its attention to reality on the ground. A theoretical plan or hypothesis is formulated, recognized methods of research are employed, and results are judged by conformity of the hypothesis with actual findings. The results are open to criticism and challenge through further investigation. From this perspective the observable world, nature and social reality are seen as the signs of God in His creation (*āyāt Allah fi'l-khalq*). Interpretation of the text is seen as an attempt to discover the manifestations of God's laws in His creation and to discover reality through sense perception and reason.[15]

Notwithstanding their different approaches to interpretation and *ijtihād*, the advocates of both positions, the idealists and the realists, tend to agree that Islamic authenticity cannot be achieved by adherence to only one of these approaches. This is because Islam itself is emphatic on attention to both text and reality. General consensus (*ijmāʿ*) and custom (*ʿurf*) are valid bases of decision-making and judgment even in the methodology of *uṣūl al-fiqh*. A correct Islamic methodology must merge these two approaches into a unified whole and take this as the cornerstone of the methodology of *ijtihād*.

The persistent decline of *ijtihād* and the dominance of *taqlīd* are a result not of shortcomings in the theory of *ijtihād* but of the socio-political climate that prevails in the Muslim world. Even after the so-called closure of the door of *ijtihād* ca. the 4th/10th century, a persistent rift between the *'ulamā'* and the state, followed by the fall of Baghdad (1258 CE) and defeat of Muslims in al-Andalus, suffocated the once thriving spirit of originality and *ijtihād* among Muslims. This tendency has been reinforced, more recently, by colonial rule and its aftermath, the ubiquitous dominance of the statute book, and the resulting secularization of law and government.

The theory of *ijtihād* and what it says on the qualifications of a *mujtahid* also require that due attention is paid to prevailing social conditions. The *uṣūl al-fiqh* methodology recognizes custom (*ʿurf*) as a source and requires the *mujtahid* to be knowledgeable of the mores and customs of his society. In fact throughout history, *ijtihād* and *fatwā* have been the main vehicles of keeping the Sharīʿah abreast

[15] Cf. Ibrahim Rajab, "al-Maʿālim al-Islami li'l-ʿUlūm al-Ijtimāʿiyyah", *Islamiyyat al-Maʿrifah*, 1:3 (1416/1996), 63-7.

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with social reality. And *fatwā* and *ijtihād* are changeable with the change of circumstances. However, the much talked about *ijtihād* has not become an engaging phenomenon of law and government in Muslim societies and the methodology of *uṣūl al-fiqh*, which was designed to encourage *ijtihād*, has fallen short of achieving that purpose. Hence, we reach the conclusion, tentatively, that new and more pragmatic approaches should be explored. I believe that our proposed methodology of harmonization is cognizant of the need to utilize the resources of *uṣūl al-fiqh* and the guidelines they offer for contemporary *ijtihād*. Our methodology makes *ijtihād* more pragmatic by using it as a tool of harmonizing the acceptable part of civil law with the Sharīʿah.

Fatwā and *ijtihād* are broad subjects about which much has been written in English,[16] for which reason I propose here to discuss only their relevance to harmonization. Another connection between *ijtihād* and harmonization is that in attempting to harmonize aspects of Sharīʿah and civil law, a need may arise for flexibility or adjustment in the existing rules of Sharīʿah or in those of the civil law. The amendment of an existing statute normally requires implementation of a procedure contained in and explained by the constitution or the law itself. A change in the substantive laws of Sharīʿah or *fiqh*, on the other hand, may require recourse to re-interpretation of the Qurʾān and hadith. A practical suggestion in this connection may be to point out the relevance of *siyāsah sharʿyyah*. The head of state or parliament may set up a council of experts in both the Sharīʿah and civil law, within or outside parliament, to consider the need for *ijtihād,* or any proposals concerning it, that are deemed conducive to harmonization. The Minister of Justice, or some such responsible official, may scrutinize the Harmonization Council's proposal and submit it to Parliament. The proposed amendment, or new legislation, can utilize any of the formulas discussed above, including *takhayyur*, *talfīq*, *istiḥsān*, and *siyāsah*, or attempt a novel interpretation of the text that seeks to harmonize Shariʿah and civil law. The Council may seek advice from academics, jurists, practicing lawyers, research bodies and institutions, as deemed necessary for the advancement of its work. The Harmonization Council may work as a parliamentary standing committee that is accorded considerable autonomy in the

[16] On the theory of *ijtihād,* see M.H. Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2003), 468-500.

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conduct of its affairs. The Harmonization Council is not a substitute for Parliament, and all of its proposed additions and amendments must therefore follow normal legislative procedures. The Council adopts decisions and legislative proposals that contemplate public welfare and partake in Sharīʿah-based *fatwā* and *ijtihād*. The Council may perform these functions and make the practice of collective and consultative *ijtihād* a part of its commitments.

It is not anticipated that harmonization of the Sharīʿah and civil law will necessitate a great deal of novel interpretation and *ijtihād*, for the prevailing legal *status quo* on both sides is taken as the basic framework for harmonization. If an attempt at harmonization offers prospects of greater coordination and uniformity in the law for the benefit of the people, it may be taken up on merit; otherwise it presumably will not be pursued.

One other *ijtihād*-related scenario may be mentioned here. If the existing *fiqh* rules are themselves deemed to be in need of adjustment and improvement, one may need to secure the correct position first and then attempt to harmonize it--if harmonization remains a viable option. As pointed out by ʿImād al-Dīn Khalīl, a contemporary writer on Islamicization of knowledge, "there are large numbers of alien materials which have infiltrated the Qurʾānic sciences, the *fiqh* analyses of problems, and changes were brought by time in the fields of *fiqh* and legislation … not based on methodology but determined by personal taste." When this is ascertained to be the case, Khalīl adds, the researcher may discard the doubtful material or rule that does not make a positive contribution and that may well relieve him of a considerable part of his investigative burden.[17]

Al-Qaraḍāwī has noted that during the period of stagnation and *taqlīd* (c. 1000–1900 CE), *fiqh* became preoccupied with issues such as ritual ablutions, menstruation, lochia, fosterage, marriage and divorce, but ignored larger issues such as the *ummah*, its standing in the world community and its mission. He adds that the situation has not changed greatly in our own times.[18] We may add here Muḥammad al-Ghazālī's observation that "relations between Muslim states and the wider international community are founded on pure human

[17] ʿImād al-Dīn Khalīl, *Islamization of Knowledge: A Methodology* (Herndon, VA: International Institute of Islamic Thought, 1991), 13-14.

[18] Yūsuf al-Qaraḍāwī, "Naḥw Fiqh Muyyassar, Muʿāṣir," *Islamiyyat al-Maʿrifah*, 5 (1417/1996), 99.

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fraternity *(al-ikhā' al-insāni al-mujjarrad)*. Muslims may only propagate *daʿwah* (summons to the faith) based on evidence and reason that is not tainted by harbouring ill-feeling...."[19] This message differs from some medieval scholastic *fiqh* positions that were influenced by the then prevailing patterns of international relations. One can add here some of the *fiqh* rules regarding the position of women in the family. As noted earlier, modern family law reform has to some extent ameliorated the situation of women and brought balance and perspective that is in greater harmony with the Qurʾānic principles of justice. The point is that not all of the *fiqh* rules that are founded on speculative *ijtihād* can be taken at face-value.

20. Goals and Objectives (*Maqāṣid*) of Sharīʿah: As noted, *maqāṣid al-Sharīʿah* offer a comprehensive reading of Islam and its Sharīʿah that is particularly meaningful to harmonizing the Sharīʿah with statutory law and the realities of social change. The traditional methodology of *ijtihād* as outlined in *uṣūl al-fiqh* is beset with problems due to the burdensome techniques developed in the post-classical periods, which may have been suited to their time but which do not encourage legal reconstruction during periods of rapid social change. Whether one speaks of *ijtihād* in the form of *qiyās* (analogical reasoning) or of *istiḥsān* (juristic preference), or of legislation by general consensus (*ijmāʿ*), these doctrines are ill-equipped for modern legislative processes. When these doctrines are compared with the more open approaches of *maqāṣid*, the *uṣūl* methodology of *ijtihād* may present initial difficulties that harmonization by itself cannot be expected to resolve. This, I submit, is why the *maqāṣid al-Sharīʿah*, which encourage greater flexibility in *ijtihād*, are likely to offer a better prospect for harmonization of the Sharīʿah and civil law.

Muḥammad Rashīd Riḍā (d. 1935) emphasized the need to inform legislation and *ijtihād* with the spirit of the Sharīʿah and its goals and purposes. Many people know what is lawful and what is unlawful but they do not always know the underlying rationale and purpose of these rules. To act on a law, it is necessary to understand its reason and purpose and the interests they serve. Knowledge of the *ḥikmah* (wisdom, philosophy) and *maqāṣid* of Sharīʿah and the insight they convey will contribute to the development of a more progressive *fiqh*. Riḍā stressed the importance of maintaining harmony and

[19] Muhammad al-Ghazali, *Turāthunā al-Fikrī fi Mīdān al-Sharʿ wa'l-ʿAql* (Herndon, VA: International Institute of Islamic Thought, 1417/1996), 35.

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coordination between the ruling (*ḥukm*) of the law, and its goal and objective. When a gap develops between the law and its objective, the law loses its versatility, and rigidity is likely to set in.[20]

The chief exponent of the *maqāṣid*, Abū Isḥāq Ibrāhim al-Shāṭibi (d. 790/1370), and more recently, Ṭāhir Ibn ʿĀshūr (d. 1393/1925), have both emphasized that the jurist must have adequate understanding of the purposes of Sharīʿah to avoid error in *ijtihād* and to be sure that he avoids a mechanical approach to *ijtihad*.[21] The *fiqh* rules may sometimes need to be reviewed in the light of the *maqāṣid*. For example, *zakāh* is a duty under the Shariʿah, but the manner in which it is collected is subject to change. If one insists on levying the *zakāh* on cereals such as wheat and barley in kind, especially in big cities, rather than allowing payment in monetary equivalents, the result will not be useful to its recipients and many even run contrary to its objective, which is to satisfy the needs of the poor in the best way possible.[22]

Maqāṣid al-Sharīʿah emerged at a later stage (around the 8th/14th century) in the development of Islamic juristic thought. The earlier *ūṣūl* jurists refer to the knowledge of the *maqāṣid* as a complement to attaining qualification to the rank of *mujtahid*. Some have even subsumed the *maqāṣid* under the *ʿillah* (effective cause) of analogy (*qiyās*), or else referred to the *maqāṣid* in their detailed discussions on custom and *istiḥsān*.

Muslim jurists have identified a scale of priorities for the *maqāṣid* which helps to ascertain their relative weight and importance. *Maqāṣid* have been classified into three categories. The first category is that of the necessities (*ḍarūriyāt*) that every society needs to maintain as a matter of absolute priority. Muslim jurists have identified preservation and protection of the five values of faith, life, family, intellect and property. These are the recognized goals and purposes of Sharīʿah, and all lawful measures that protect and promote them are by definition in harmony with the Sharīʿah, even if no detailed ruling can be found in the existing Sharīʿah. The second category,

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[20] Muḥammad Rashīd Riḍā, *Tafsīr al-Qur'ān al-Ḥakīm* (also known as *Tafsīr al-Manār*), (Beirut: Dar al-Maʿrifah, 1328 H) 3:30.

[21] Abu Isḥāq Ibrāhīm al-Shāṭibi (d.790 H), *al-Muwāfaqāt fi Uṣūl al-Aḥkām*, ed. Shaykh ʿAbd Allah Darrāz (Cairo: al-Maktabah al-Tijāriyyah al-Kubrā, n.d), 4:105; Muhammad Ṭāhir b. ʿĀshūr, *Maqāṣid al-Sharīʿah al-Islamiyyah* (Tunis: Matbaʿah al-Istiqamah, 1966), 15-16.

[22] Cf. al-Qaraḍāwī, "*Naḥw Fiqh Muyassar*," 1120, n. 14.

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complimentary needs (*ḥājiyāt*), supports and supplements the *ḍarūriyāt*. The third category, desirabilities (*taḥsīniyāt*), includes those things that bring beauty and elegance, and, although not essential in themselves, promote better ways and means of securing the higher categories of the *maqāṣid*.[23]

Beginning with Imām al-Ḥaramayn al-Juwaynī and his disciple al-Ghazālī (d. 505/1111), Muslim jurists have identified the five above-mentioned values as the primary *maqāṣid*. Later Shihāb al-Dīn al-Qarāfī (d. 684/1283) and then Taqī al-Dīn Ibn Taymiyyah (d. 728/1328) tried to extend the range of *maqāṣid* and suggested that the essential *maqāṣid* are an open chapter that may include other values, such as human dignity and freedom and honoring one's contractual obligations. In modern times, one might add Research and Development and the idea of a welfare state. Modern Islamic thinking on the *maqāṣid* seems to favor this more open approach, which helps to make the *maqāṣid* more relevant to changing social needs across time and space.

The question of how the *maqāṣid* may be identified in such a way as to avoid arbitrariness has been only partially answered by the earlier jurists. It is generally maintained that the *nuṣūṣ* of the Qur'ān and Sunnah provide a firm basis for identification of the *maqāṣid*. To this al-Shāṭibī added that the *maqāṣid* also can be identified through inductive reasoning (*istiqrā'*), i.e. by drawing general conclusions from the detailed observation of numerous incidents. A wide range of values can thus be identified from a general reading of Qur'ān and Sunnah, even if no clear text can be found in these sources that declares them as such. This would enable identification of *maqāṣid*, outside the specified five, through one's general knowledge of the values that are upheld in the sources.

Maqāṣid that relate clearly to *ḍarūriyāt* may be regarded as definitive (*qaṭʿi*). Those that are identified by induction (*istiqrā'*) from the clear *nuṣūṣ* may be added to this category. As for *maqāṣid* that cannot be included in either of these two categories, they may still be treated as definitive if there is a general consensus or clear legislation in their support. Additional *maqāṣid* that fall outside this range may be classified as speculative (*ẓannī*) and they remain in this category until

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[23] On the classification of *maqāṣid* see further M.H. Kamali, *Principles of Islamic Jurisprudence* (Kuala Lumpur: Ilmiah Publishers, 1998), 395-410; idem, "*Maqāṣid al-Sharīʿah*: The objectives of Islamic Law," *Islamic Studies xxxix* (1999), 201f.

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they are elevated to the rank of "definitive" through consensus or legislation. In the event of a clash between definitive *maqāṣid* and speculative *maqāṣid*, the former will take priority over the latter. Among the definitive *maqāṣid*, those which preserve faith and life take priority over the other three, followed by protection of the family, and then by intellect and property. A similar order of priority applies to the essential *maqāṣid*, those deemed complementary, and those classified as desirabilities (*taḥsīniyāt*).

Clearly, harmonization of Sharīʿah and civil law can draw inspiration and support from the goals and objectives of Islam: harmonization will be worthwhile and desirable if it serves any of the valid objectives of Sharīʿah in the categories of *ḍarūriyāt*, *ḥājiyāt*, or values that are identified through inductive reasoning and *ijtihād*.

There remains the question of how arbitrariness can be avoided in the identification of *maqāṣid*, which, like benefits (*masāliḥ*), are open-ended. Methodological guidelines are needed to ensure unwarranted indulgence in personal or partisan bias. The skill and assistance of our proposed Harmonization Council may be utilized in this context. It certainly would be reassuring to secure the advice and approval of a learned council about a particular *maqṣad* (singular of *maqāṣid*–a goal or purpose) that is identified for the purpose of harmonization. The Council itself may choose to adopt a specific procedure/methodology for the purpose of verifying the accuracy of its own recommendations.

21. Graduality (*Tadarruj*): Harmonization of Sharīʿah and civil law should be gradual and piecemeal. A pragmatic approach is advisable since ready-made proposals and formulas for harmonization are not available and need to be worked out and refined. Harmonization may need to be tailored to the specific conditions of the society which decides to apply it. A staggered approach may take into consideration the idea of prioritizing certain areas and issues, such as commercial transactions, family law, and constitutional law. Graduality has both a quantitative and a qualitative dimension. Questions may arise as to how much of the Sharīʿah or of the civil law are to be harmonized in a particular area and whether the approach taken is pragmatic and feasible. Considerations of pragmatism may dictate compromises; some aspects of *fiqh* or civil law may need to be postponed, even left out, in order for the rest to be harmonized. This *ad hoc* approach will be reviewable at a later stage of development when a more advanced level of harmonization is feasible.

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Graduality is firmly grounded in Islam, in the Qurʾānic revelation, in the Sunnah and their approaches to social reform. It has many well-known advantages that are relevant to our proposed methodology of harmonization. A gradualist approach affords one with the opportunity for self-evaluation and correction. This is important because the effects of harmonization in particular cases and settings can best be known through implementation and over a period of time.

A gradual approach to harmonization is advisable in view of the decline of *ijtihād* and prevalence of *taqlīd*, colonialism, the tide of secularity and so forth. Colonial rule in Muslim lands aimed at sidelining the Sharīʿah and replacing it with Western laws in almost all spheres of public law. Only family law was spared, due to fear of popular resistance. The secularization of commercial law, constitutional law, criminal law and procedure were carried out with varying degrees of intensity and success in most of the colonized Muslim countries. Public education, the legal profession and the judiciary underwent similar changes. In most areas, Western laws and institutions replaced their Islamic counterparts. Only in some areas, such as education, has a certain duality and coexistence of Western and Islamic institutions remained.

In some cases the Western model and prototype has become entrenched so that even partial and gradual attempts to bring changes in them have proven to be problematic. In some Muslim countries such as Malaysia, Pakistan, and Sudan, public education, the legal profession and the judiciary are entrenched in Western models and subsequent attempts to bring Sharīʿah-based changes and reforms in line with the demands of Islamic revivalism have been ineffective.

The attempt to harmonize the Sharīʿah with civil law is not necessarily premised on a balance between both in the same field. One may sometimes be faced with situations in which the civil law almost totally dominates, and others in which the Sharīʿah is dominant. Harmonization can be attempted in these situations as well as in cases in which both the Sharīʿah and civil law may be operative and a situation of duality prevails, as in the case of Islamic and conventional banking. Alternatively, each may be practiced in part, but otherwise stand in a state of disharmonized coexistence. This latter situation can be envisioned in the laws governing public education in Muslim schools and universities where the concern has been to introduce Islamic approaches and concepts into an otherwise Western dominated model that has proven resistant to

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harmonization and compromise. A persistent duality between the *madrasa* and the modern state school still obtains, and the attempt to unify the religious and secular approaches to education has been ineffective after decades of efforts in the direction of uniformity and harmonization.

Conclusion

Since the proposed methodology of harmonization between the Sharīʿah and civil law includes both parliamentary legislation and *ijtihād*, the most efficient way of achieving harmony is to try to attempt it in the spheres of legislation and *ijtihād*. The legislators should take care to approve Acts of Parliament that are in harmony with the Sharīʿah. Likewise, the *mujtahid* should strive to ensure that his *ijtihād* is in harmony with statutory law. If the legislator and *mujtahid* consult with one another directly and reach an agreement over issues, or better still, if they sit together on a council, one may anticipate an efficient approach towards achieving harmony. The ideal situation would be for the legislator to possess the qualifications of a *mujtahid*, failing which the two sides should consult one another, or else avail themselves of the expert advice of the Harmonization Council.

This analysis takes for granted that the harmonization of Sharīʿah and civil law, at the outset, or *ex post facto*, requires the necessary expertise in both the Sharīʿah and civil law disciplines. Experts in the civil law and the Sharīʿah can and to some extent do consult one another over issues, but the ideal situation, as noted, would be that the two areas of expertise are combined in one and the same person. This would require universities to develop curricula that combine a balanced knowledge of both the Sharīʿah and civil law. Some progress has already been made through the introduction of Islamic universities in Malaysia, Pakistan, the Sudan. In other Muslim countries, universities combine both Islamic and modern educational methods and programs in their courses. The relevant programs must be continually revised, upgraded and enhanced with a view to training persons who combine expert knowledge in both the Sharīʿah and civil law.

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